United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1901.

No. 1134.

111

JOHN M. CLAPP, APPELLANT,

vs.

HENRY B. F. MACFARLAND, JOHN W. ROSS, AND LANSING H. BEACH, COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 21, 1901.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 29, 1901.

In the Court of Appeals of the District of Columbia.

JOHN M. CLAPP, Appellant,
vs.
HENRY B. F. MACFARLAND ET AL. } No. 1134.

a Supreme Court of the District of Columbia.

In re WIDENING OF COLUMBIA ROAD AND SIXTEENTH STREET.
No. 577. District Court.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Petition.*

Filed Jul- 12, 1900.

In the Supreme Court of the District of Columbia, Sitting as a District Court.

In re WIDENING OF COLUMBIA ROAD AND SIXTEENTH STREET.

The petition of Henry B. F. Macfarland, John W. Ross, and Lansing H. Beach respectfully shows:

1. That they are the Commissioners of the District of Columbia, and by the provisions of the act of Congress approved June 6, 1900, entitled "An act authorizing and requiring the Metropolitan Railroad Company to extend its lines on old Sixteenth street," they were directed to institute, by petition, a proceeding in this court to condemn the land necessary for the widening of Columbia road to a width of one hundred feet, and the present Sixteenth street to a width of eighty-five feet from Columbia road to Park street.

2. That a map of the proposed extension or widening of Columbia road and Sixteenth street, showing the number and designation of the parcels of land affected thereby, the names of the owners thereof, and area of the land to be condemned for such widening, has been prepared, and a copy thereof is hereto annexed, marked "Exhibit D. C. No. 1," and made a part of this petition.

3. That in and by said act of Congress it is provided, among other things, as by reference thereto will appear, "That of the amount

found to be due and awarded as damages for and in respect
2 of the land condemned for the extension of Columbia road and present Sixteenth street, as herein provided, such proportional amount thereof as the jury shall determine shall be assessed as benefits, and to the extent of such benefits, against respectively the Metropolitan Railroad Company, and against those pieces or parcels of land on each side of said Columbia road and the present Sixteenth street northwest along those portions of said streets that are to be widened, and also on any or all pieces or parcels of land which will be benefited by the extension of said Columbia road and the present Sixteenth street northwest as said jury may find said pieces or parcels of land will be benefited; and in determining the amounts to be assessed against said pieces or parcels of land the jury shall take into consideration the respective situations of such pieces or parcels of land and the benefits they may severally receive from the extension of Columbia road as aforesaid." Wherefore your petitioners pray:

* * * * * * *

3 3. That a jury of seven judicious, disinterested men may be summoned by the marshal of the District of Columbia to condemn the land necessary for the extension of said Columbia road, and to assess the benefits resulting therefrom, as re-
4 quired by said act of Congress.

4. That the land hereinbefore described, necessary for the widening of Columbia road and old Sixteenth street, may be condemned by the order and decree of this court.

HENRY B. F. MACFARLAND,
JOHN W. ROSS,
LANSING H. BEACH,
Commissioners of the District of Columbia.

A. B. DUVALL,
C. A. BRANDENBURG,
Attorneys for Petitioners.

DISTRICT OF COLUMBIA, *ss:*

Henry B. F. Macfarland and Lansing H. Beach upon oath say that they and John W. Ross are the Commissioners of the District of Columbia, and that they have read the foregoing petition by them subscribed as such Commissioners and know the contents thereof, and that the facts therein stated upon their personal knowledge are true, and those stated upon information and belief they believe to be true.

HENRY B. F. MACFARLAND.
LANSING H. BEACH.

Subscribed and sworn to before me this eleventh day of July, 1900.

WILLIAM TINDALL,
Notary Public, D. C.

[Endorsed:] 577. Dist. ct. Copy petition.

5 *Order for Jury.*

Filed August 1, 1900.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re WIDENING OF COLUMBIA ROAD AND SIXTEENTH STREET. No. 577. District Court.

It appearing to the court that the public notice by advertisement heretofore ordered in this cause to be given has been duly published, as therein provided, and that the United States marshal for the District of Columbia has caused a copy of said notice to be served upon such owners of the land to be condemned as could be found within the District of Columbia, now, on consideration of the petition of the Commissioners of the District of Columbia filed herein, it is, this 1st day of August, A. D. 1900, on motion of counsel for said Commissioners,

Ordered that the United States marshal for the District of Columbia summon a jury of seven judicious, disinterested men, not related to any person interested in the proceedings, and not in the service or employment of the District of Columbia or of the United States, to be and appear in this court on Thursday, the 2d day of August, A. D. 1900, at 10 o'clock a. m., to assess the damage each owner of land taken herein may sustain by reason of the widening of Columbia road to a width of one hundred feet and the present Sixteenth street to a width of eighty-five feet from Columbia road to

6 Park street, and the condemnation of lands for the purposes of such widening, as set forth in the said petition and the plat filed therewith, and to assess the benefits resulting therefrom, as provided in the act of Congress approved June 6, 1900, entitled "An act authorizing and requiring the Metropolitan Railroad Company to extend its lines on old Sixteenth street."

By the court:

JOB BARNARD, *Justice.*

Marshal's Return.

AUGUST 1, 1900.

Pursuant to the within order the following-named jurors were summoned to appear at the time stated in said order:

1. Robert I. Fleming.
2. Thomas W. Smith.
3. John A. Hamilton.
4. Edward Graves.
5. James F. Oyster.
6. W. A. H. Church.
7. Henry O. Towles.

AULICK PALMER,
U. S. Marshal.

7 *Instruction No. 4, Submitted by E. H. Thomas.*

Filed November 7, 1900.

* * * * * * *

4. The court instructs the jury that section 4 of the act of Congress approved June 6, 1900, under which this proceeding is instituted, provides that of the amount found to be due and awarded as damages for and in respect of the land condemned for the extension of Columbia road and the present Sixteenth street such proportional amounts thereof as the jury shall determine shall be assessed as benefits, and to the extent of such benefits, against respectively the Metropolitan Street Railroad Company and against those pieces or parcels of land on each side of said Columbia road and the present Sixteenth street, and also on any or all pieces or parcels of land which will be benefited; but the jury are further instructed that the basis of assessment of the proportional amount aforesaid against the said several classes of property is the value of the special benefit which accrues to the owner and not the cost of the proposed improvement nor the amount of damages awarded, nor any particular ratio or part thereof.

Granted as amended.

Exception by Darlington.

8 In the Supreme Court of the District of Columbia, Sitting as a District Court.

Filed Sept. 27th, 1900. J. R. Young, Clerk.

In re THE WIDENING OF COLUMBIA ROAD AND THE PRESENT SIXTEENTH STREET N. W. No. —. District Court.

Verdict of Jury.

We, the jury in the above-entitled cause, hereby find the following verdict and award of damages for and in respect of the land condemned and taken for the widening of Columbia road to a width of one hundred feet and the present Sixteenth street to a width of eighty-five feet from Columbia road to Park street, etc., as shown on a plat or map filed with the petition in this cause, amounting to the sum of one hundred and eighty-one thousand eight hundred and fifty-eight dollars [$181,858.00], as set forth in Schedule 1, hereto annexed as part hereof.

And we, the jury aforesaid, in accordance with the act of Congress approved June 6, 1900, for the widening of Columbia road and the present Sixteenth street, do hereby find the amount of benefits resulting therefrom to be the sum of ninety thousand and nine hundred and twenty-nine dollars [$90,929.00] and twenty-five thousand dollars [$25,000.00].

And we, the jury aforesaid, find that the Metropolitan Railroad Company (called in said act the Metropolitan Street Railroad Company) will be benefited by the aforesaid widening of Columbia road and the present Sixteenth street, and that the

9 pieces and parcels of land that will be benefited by the aforesaid widening of Columbia road and the present Sixteenth

street are the pieces and parcels of land on each side of said Columbia road and the present Sixteenth street where said streets are to be widened, and the other pieces and parcels of land mentioned and described in Schedule 2, hereto annexed as part hereof; and we find that the Metropolitan Railroad Company and the several pieces and parcels of land in said Schedule 2 will be benefited as aforesaid to the extent of the respective amounts mentioned and set forth in said Schedule 2, and we assess against the Metropolitan Railroad Company and the pieces and parcels of land respectively as and for benefits, as aforesaid, the several amounts mentioned, specified, and set forth in said Schedule 2.

Witness our hands and seals this 20th day of September A. D. 1900.

ROBERT I. FLEMING.
EDWARD GRAVES.
JAS. F. OYSTER.
HENRY O. TOWLES.
THOMAS W. SMITH.
JOHN A. HAMILTON.
W. A. H. CHURCH.

Memorandum.

For Schedules No. 1 and No. 2, see blue prints at back of record.

10 SCHEDULE No. 1.

Block.	Lot.	Square feet of area.	Awards.	Owners.
* *	*	*	*	* *
(Unsubdivided tract bounded by Lanier Heights, Walbridges, Ingleside, Columbia road, Denison and Leighton's subdivision, and lands of Mary Swaim Thompson)	.....	9,260.4	$5,556.00	John M. Clapp.
* *	*	*	*	* *

SCHEDULE No. 2.

Block.	Lot.	Square feet of area.	Assessment.	Owners.
* *	*	*	*	* *
Unsubdivided tract described as follows: Beginning at the southwest corner of lot 81 of Denison & Leighton's subdivision, thence 86° 50′ E. 330 feet, thence S. 14° 29′ E. 818 feet, thence S. 53° 15′ W. 280.73 feet, thence N. 41° 23′ W. 739 feet, thence N. 14° 29′ E. 445 feet, thence direct to the beginning.	.....	.....	2,032.00 $5,339.00	John M. Clapp.
* *	*	*	*	* *

11 In the Supreme Court of the District of Columbia, Holding a District Court.

Filed Oct. 27, 1900. J. R. Young, Clerk.

In re THE WIDENING OF COLUMBIA ROAD AND THE PRESENT SIXTEENTH STREET N. W. No. 577.

Exceptions to Award of Damages and Assessment of Benefits by John M. Clapp.

And now comes John M. Clapp, the owner of the unsubdivided tract of land described in the verdict and award of the jury in the cause as bounded by Lanier Heights, Walbridge's, Ingleside, Columbia road, Dennison and Leighton's subdivision, and the lands of Mary Swain Thompson, and particularly described in Schedule 2 of said verdict, and objects to said verdict and award and moves the court to set aside and vacate that part of the same relating to said land both as to the award of damages of fifty-five hundred and fifty-six [$5,556] dollars for nine thousand two hundred and sixty and $\frac{4}{10}$ [9,260.4] square feet of said land taken, as set forth in Schedule 1, and to the finding of two thousand thirty-two [$2,032] dollars and five thousand three hundred and thirty-nine [$5,339] dollars benefits, as set forth in Schedule 2, because the said award of damages and finding of benefits are each contrary to the evidence, contrary to law and the instructions of the court, and because the said award of damages is grossly inadequate, and the said finding of benefits is for general and not special bene-

12 fits, and because said finding of benefits is grossly excessive, and both the said award of damages and finding of benefits is unjust and unreasonable, and also for the following reasons, viz:

1. The verdict and finding of the jury of the amount of benefits to the said tract owned by this exceptant is on its face uncertain and indefinite, not in accordance with the requirements of the statute, and void.

2. The award of benefits in the amount of ninety thousand nine hundred and twenty-nine [$90,929] dollars and twenty-five thousand [$25,000] dollars out of the award of one hundred eighty-one thousand eight hundred and fifty-eight [$181,858] dollars for damages is grossly excessive, unjust, and unreasonable, and to the extent the proportionate amount of the finding is against said ten acres of land owned by this exceptant the same is grossly excessive, unjust, and unreasonable.

3. The jury acted under an erroneous and illegal principle in their finding of benefits and in the finding of benefits against the said tract of land owned by this exceptant on a wrong basis of computation.

4. The jury in their finding of benefits acted under an erroneous

construction of the act of Congress providing for these proceedings, believing it was required of them to assess one-half, at least, of the damages awarded as benefits against the abutting parcels of land, otherwise the Commissioners of the District of Columbia would reject their award and assessment, and made their finding of benefits against the abutting parcels of land one-half of the amount of their award, contrary to law, without regard, as required by the instructions of the court, to special benefits to each parcel, and were influenced so to do by the argument of the attorney for the District of Columbia to the effect that if they did not so find the said Commissioners would reject their award and assessment and he would
13 so advise, and thereby the said jury found unjustly and unreasonably that the said land of your exceptant had been benefited in the sum of two thousand and thirty-two [$2,032] dollars and the sum of five thousand three hundred and thirty-nine [$5,339] dollars or aggregate of seven thousand three hundred and seventy-one [$7,371] dollars, being one thousand eight hundred and fifteen [$1,815] dollars in excess of the damages awarded this exceptant.

5. That the provision in the said act of Congress giving the Commissioners of the District of Columbia discretion within thirty days after the filing of said award to reject the award and assessment of the jury is beyond the power of Congress and void, and the said jury were unjustly and to the prejudice of your exceptant influenced thereby.

6. The jury disregarded as to the said land of this exceptant in their finding of benefits the instruction of the court that if any pieces or parcels of land are not in fact benefited it was their duty not to assess any benefits against the same, and the further instruction of the court that the basis of assessment of the proportional amount of benefits is the value of the special benefit which accrued and not the cost of the proposed improvement nor the amount of damages awarded, nor any particular ratio or part thereof.

7. That the jury received evidence as to parking and sidewalks contrary to the instructions of the court.

8. The jury in their award of five thousand five hundred and fifty-six [$5,556] dollars as damages to your exceptant for nine thousand two hundred and sixty and $\frac{4}{10}$ [9,260.4] square feet of his said land taken in these proceedings unjustly discriminated against your exceptant and his said land so taken and in favor of other land in like situation and of no greater value immediately opposite, and adopted an erroneous and illegal principle and a wrong basis of computation in giving greater value to land platted as
14 against land unplatted.

9. The award of jury of five thousand five hundred and fifty-six [$5,556] dollars, the damages sustained by your exceptant by the taking of nine thousand two hundred and sixty and $\frac{4}{10}$ [9,260.4] square feet of his said land, is contrary to the weight of evidence produced before them and is unjust, inadequate, and unreasonable.

10. Because the finding of benefits is $1,815 in excess of damages

awarded this exceptant for the part of said land taken and is an unequal, unjust, and unreasonable discrimination against him and an unfair and unequal taxation of the property of this exceptant, and was made on a wrong basis of computation.

These objections and this motion to set aside said award and finding as to the said land of your exceptant *is* founded upon the affidavits of George Francis Williams, Donald McPherson, Edward H. Thomas, and this exceptant, filed herewith, and upon other affidavits hereafter to be filed, and upon the report of the jury on file herein, and upon the record and the evidence taken before the said jury and the minutes thereof in their possession, and upon such oral evidence to be taken as required or allowed by the court.

And this exceptant prays the court to require the said jury to file their minutes of the evidence taken before them in this cause by summary order or by writ of certiorari, and to grant your exceptant a due hearing on the matters of law and fact above set forth, and that these objections may be taken also as his answer to the rule to show cause issued herein and returnable October 29, 1900.

JOHN M. CLAPP.

E. H. THOMAS,
Att'y for John M. Clapp, Exceptant and Respondent.

15 STATE OF PENNSYLVANIA, }
Venango County, } *ss:*

I, John M. Clapp, on oath say that I have read the above objections and answer and verily believe the matters of fact therein stated to be true.

JOHN M. CLAPP.

Subscribed and sworn to before me this 27th day of October, A. D. 1900.

J. R. YOUNG, *Clerk.*
R. J. MEIGS, JR., *Ass't Clerk.*

16 In the Supreme Court of the District of Columbia, Holding a Special Term as a District Court.

In re WIDENING OF COLUMBIA ROAD AND OLD SIXTEENTH STREET.
No. 577, District Doc. No. 2.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, a notary public in and for said District, George Francis Williams, who, being by me first sworn in due form of law, says as follows, namely:

I am a member of the bar of the supreme court of the District of Columbia, and represented certain of the property-owners in the above-entitled condemnation proceedings. I am acquainted, in a business way, with Mr. Henry O. Towles, who was one of the jury in the above-entitled matter, and the first time he met me, after the ver-

dict had been returned herein, he asked me casually whether I was satisfied with the verdict, or how I liked the verdict, or a question to the same effect. In replying, I said, among other things, I could not understand how the jury found so large a sum for benefits, and made particular reference to a certain lot which had been assessed for benefits, as to which all the witnesses who testified on the point said there would be no benefit. Mr. Towles replied in substance that the jury were obliged under the act to assess benefits, and that when they had first made up their assessments and added them together they found they were—to quote as nearly as I can his words—"away short of our amount." I asked what amount? He explained that he meant an amount equal to fifty per cent. of the awards, and when I remarked that the jury were
17 certainly under no obligation to assess benefits equal to fifty per cent. of the awards he replied, in substance, that they were obliged either to do that or to have all their work count for nothing; that they had it from Mr. Duvall very plainly at the argument that the Commissioners would reject the whole finding unless the benefits, exclusive of the assessments against the Metropolitan Railroad Company, equaled at least one-half of the total amount of awards. Mr. Towles further said, in substance, that the jury was obliged to go over their figures and make many changes in order to increase the sum total of the benefits, and that even then they found the benefits assessed did not aggregate fifty per cent. of the awards, and that they had to go on and make assessments against some other lots, which additional lots they had not at first intended to assess, in order to make the sum total of the benefits, exclusive of those assessed against the railroad company, equal fifty per cent. at least of the awards.

This conversation took place on Fourth and D streets, near my office, about the middle of the current month of October.

Further affiant saith not.

GEO. FRANCIS WILLIAMS.

Subscribed and sworn to before me this 26th day of October, A. D. 1900.

HARRY M. PACKARD,
Notary Public, D. C. [SEAL.]

18 DISTRICT OF COLUMBIA, *ss:*

Donald McPherson, being duly sworn, deposes and says that he is a member of the bar of the supreme court of the District of Columbia, and that he was present when the instructions of the court and the final statement were made to the jury in the District court, case No. 577, *In re* widening of Columbia road and the present Sixteenth street northwest; that Mr. Andrew B. Duvall, the attorney for the Commissioners of the District of Columbia, was present, representing said Commissioners at the said time, and addressed the jury in said cause, stating in substance to the said jury by way of argument that they should assess as benefits against the

parcels of land abutting on said Columbia road and said Sixteenth street one-half the amount of their award of damages for the property taken by the widening of said road and said street, and that, unless the said jury did so assess as benefits one-half of the amount of said awards of damages against said properties, the Commissioners of the District of Columbia would reject said award, and that as their attorney he would so advise them, the said Commissioners, to do.

DONALD McPHERSON.

Subscribed and sworn to before me this 26th day of October, A. D. 1900.

S. A. TERRY,
Notary Public.

[SEAL.]

19 DISTRICT OF COLUMBIA, *ss:*

Edward H. Thomas, being duly sworn, deposes and says that he met Mr. John A. Hamilton, one of the members of the said jury, about ten days ago, at the city hall, and asked him where the minutes of the evidence were taken by the said jury; to which Mr. Hamilton replied that Mr. James F. Oyster, another member of the said jury, was the secretary and had the same in charge.

Thereupon affiant called Mr. Oyster over the telephone and asked him if the jury would not file the said minutes with the clerk or marshal. Said Oyster replied that he had consulted with several members of the jury and would have to deny affiant's request, and that he did not know whether he had said minutes, but would look for them, and the interview was closed by affiant asking the said Oyster to be careful to preserve the said papers and see that they were not lost.

EDWARD H. THOMAS.

Subscribed and sworn to before me this 27th day of October, A. D. 1900.

J. R. YOUNG, *Clerk,*
By R. J. MEIGS, JR., *Ass't Clerk.*

20 DISTRICT OF COLUMBIA, *ss:*

John M. Clapp, being duly sworn, deposes and says that he is the owner of that tract of land situated on the north side of Columbia road and fronting the same, bounded on the west by the lands of George P. Van Wyck, Jr., and on the east by the lands of Mary Swain Thompson, of which land 9,260.4 square feet, with a front line of 264 feet and a rear line of 280.73 feet by a depth of 34 feet, fronting on the north side of said Columbia road, is taken for the widening of said road by the proceedings in case No. 577 now pending in the supreme court of the District of Columbia as a District court. Affiant further states that he has been awarded for the said 9,260.4 square feet of ground as damages the sum of $5,556 by the verdict of the jury filed in said case on the 27th day of September, 1900, and that

the said jury, by their said verdict, awarded as damages for the land taken immediately opposite to him the sums of $1.08 and $1.10 per square foot, while for the said part of his land so taken the jury awarded but $.60 per square foot. Affiant says that the part of his land so taken is, in his opinion, equally, if not more favorably, situated, and is of equal value to the said land on the south side of Columbia road, and that the north side of said road is in fact more desirable because it has a south front, which is the frontage usually preferred by purchasers. Affiant further says that he has examined the verdict and report of the jury in said case and finds from examination of same that by their said report they have valued most of the land taken on the north side of Columbia road from $.60 per square foot to $.75 per square foot on the inside lots, and from a little over $.75 to $1.50 per square foot for the part of the land taken on the south side of Columbia road. Most of this land taken on the south side of Columbia road is awarded from $1.08 to $1.44 per square foot and the two lots immediately opposite land of said John M. Clapp are awarded $1.08 and $1.10 per square foot.

21 Affiant further says that it would seem to him from an examination of their said verdict and report that they went through with their list of assessments of benefits to all the property, and that in so doing they assessed to George P. Van Wyck, Jr., $1,040; to John M. Clapp, $2,032, and to Mrs. Mary Swain Thompson, $5,720; that on footing it all up the assessments lacked [including said assessments of benefits to George P. Van Wyck, Jr., to John M. Clapp, and to Mrs. Mary Swaim Thompson] $13,758 of being one-half of the award of damages.

Affiant further says it appears from further inspection of verdict and report that said jury, in order to make up said amount of $13,758 lacking to make said assessment of benefits equal to one-half of award of damages, selected the properties of the last three-named persons, and unequally reassessed the same, viz., by adding $1,699 to Van Wyck, $5,339 to Clapp, and $6,720 to Thompson, making said total sum of $13,758.

Affiant further says that he is advised that this said computation of the jury is wrong, illegal, and erroneous in principle.

Affiant further says that he is informed and believes that the only testimony as to special benefits was given by one Damman, who testified that the property was benefited by widening of Columbia road to the depth of 150 feet, and from examination of said verdict and report affiant finds that other property similarly situated to his said land was not assessed in proportion anywhere near the assessment of benefits to his said land; that block 21, of 128,188 square feet, was assessed but $2,558, and was awarded $14,670, leaving a net award of $12,112; block 22, of 58,412 square feet, was awarded $16,456, and assessed $2,404, leaving a net award of $14,052; block 14, of 149,262½ square feet, was awarded $12,961, and assessed $3,301, leaving a net award of $9,660, while affiant's said land so taken was only awarded $5,556, and was assessed

22 $7,371, being $1,815 in excess of award of damages; that

blocks 21 and 22 are opposite affiant's property, and block 14 is the block next west of block 21.

That on the same basis as blocks 21 and 22, which are opposite to affiant's land, the 9,260.4 square feet taken from said affiant should, after deducting benefits for 166 ft. back of same, have been awarded the sum of about $8,783.17 over and above the assessments made against his land; or, if they had considered only the amount of land taken and the net amount thereto awarded in said blocks 21 and 22 and said Clapp's land, it would have left said John M. Clapp the net sum of $8,496.90 over and above the amounts so assessed.

Affiant hereby annexes as part of this affidavit his calculation showing the matters of fact above stated.

JOHN M. CLAPP.

Subscribed and sworn to before me this 27th day of October, A. D. 1900.

J. R. YOUNG, *Clerk*,
By R. J. MEIGS, Jr., *Ass't Clerk*.

23 Length of back line of land taken from John M. Clapp as per engineer's report..... 280.73 ft.
Length of front line of same..... 264.00 ft.

16.73 ft.

34 : 16.73 : : 166 : 31.68 & 280.73 + 40.84 — 321.57.
Average length of the two lines of the 166 feet..... 321.57 ft.
Depth of land taken..... 34.00 ft.

On west side of Quarry road assessments are made on 166 feet of back end of front row of lots.

321.57 × 166 — 53,380.6 square ft.

53,380.6 + 9,260.4 = 62,641 square ft., being amount of 200 ft. in depth of lands of John M. Clapp previous to these proceedings.

Block 21 of 128,188 sq. ft. was awarded in excess of its assessments..... $12,112.00
Block 22 of 58,412 sq. ft. was awarded in excess of its assessments..... 14,052.00

$26,164.00

128,188 + 58,412 = 186,600 sq. ft.
186,600 — $26,164.00 : : 62,641 : $8,783.17.

Area taken of block 21..... 13,579
Area taken of block 22..... 14,936

28,515

28,515 : 9,260.4 : $26,164.00 : $8,496.90.

24 BLOCK 14.

Lot.	Area taken.	Award.	Area assessed.	Asessments.
1	.....	.....	7,500.0	
2	.....	.....	7,500.0	$25.00
3	.....	.....	7,500.0	40.00
4	.....	.....	7,500.0	50.00
5	.....	.....	7,500.0	75.00
6	.....	.....	7,500.0	100.00
7	.....	.....	7,500.0	150.00
8	.....	.....	7,500.0	150.00
9	.....	.....	7,500.0	150.00
10	.....	1.00	7,500.0	210.00
11	1,588.0	1,985.00	5,847.0	521.00
12	4,316.0	4,748.00	2,465.0	234.00
13	4,947.5	5,442.00	2,605.0	248.00
14	1,309.0	785.00	6,185.0	588.00
15	.....	.....	7,500.0	210.00
16	.....	.....	7,500.0	150.00
17	.....	.....	7,500.0	125.00
18	.....	.....	7,500.0	150.00
19	.....	.....	7,500.0	75.00
20	.....	.....	7,500.	50.00
	12,160.5	12,961.00	137,102.0	3,301.00
			12,160.5	
			149,262.5	

25 BLOCK 21.

1	.....	.....		7,500.0	
2	.....	.....		7,500.0	$150.00
3	.....	.....		7,500.0	
4	.....	.....		7,500.0	75.00
5	.....	.....		7,500.0	75.00
6	.....	.....		7,500.0	100.00
7	.....	.....	[2]	7,500.0	[2] 150.00
8	.....	.....		7,500.0	175.00
9	283.0	256.00		7,217.0	210.00
10	6,653.7	7,191.00		4,966.3	472.00
11	6,404.0	7,044.00		5,164.0	491.00
12	283.3	179.00		7,261.7	210.00
13	.....	.....		7,500.0	150.00
14	.....	.....		7,500.0	125.00
15	.....	.....		7,500.0	100.00
16	.....	.....		7,500.0	75.00
	13,579.00	14,670.00		114,609.0	2,558.00
				13,579.0	
				128,188.0	

BLOCK 22.

Lot.	Area taken.	Award.	Area assessed.	Assessment.
1	.....	.....	7,500.0	210.00
2	.....	.....	7,500.0	100.00
3	19.0	10.00	7,481.0	100.00
4	2,507.2	2,758.00	6,399.0	608.00
5	2,542.5	2,797.00	4,706.0	447.00
6	2,577.3	3,972.00	3,012.0	286.00
7	5,090.0	5,599.00	1,599.0	152.00
8	2,200.0	1,320.00	5,279.	501.00
	14,936.0	16,456.00	43,476.0	2,404.00
			14,936.0	
			58,412.0	

26 In the Supreme Court of the District of Columbia, Holding a Special Term as a District Court.

Filed Nov. 23, 1900. J. R. Young, Clerk.

In re WIDENING OF COLUMBIA ROAD AND OLD SIXTEENTH STREET.

Affidavit of Henry O. Towles.

Personally appears Henry O. Towles, who, being duly sworn, deposes and says: I was a member of the jury of condemnation in the above-entitled cause. I have read the affidavit of George Francis Williams, filed in said cause. That I have a slight acquaintance with the said George Francis Williams, and believe he represented some property owner or owners in this proceeding, but affiant had and has no knowledge of what property was represented by the said Williams.

After the verdict was returned I had a casual conversation with Mr. Williams, meeting him accidentally near 4½ street and D street N. W., and said to Mr. Williams that he hoped he was pleased with the verdict. Affiant did not tell said Williams that the jury were obliged, under the act, to assess benefits, and that when they had first made up their estimates and added them together they found they were "away short of our amount," meaning an amount equal to 50% of the awards, or that the said jury were obliged to assess benefits equal to 50%, or have all of their work count for nothing, or that they had it from Mr. Duvall very plainly at the argument that the Commissioners would reject the whole finding unless the benefits, exclusive of the assessment against the railroad company, equaled at least one-half of the total amount of the awards.

27 Affiant says that his conversation with the said Williams was a very brief, casual conversation; that he told the said Williams that he was surprised that he [Williams] or any of the property-owners were dissatisfied; that the jury had very carefully and conscientiously examined into the question of benefits; that they had revised their assessments of benefits on several occasions, but had not finally fixed upon the amounts or the property which would be benefited by the extension until late in their conferences, when they finally received a complete map showing the area in detail beneficially affected by the extension. Affiant further says that when the testimony was completed and the court had instructed the jury, in the argument of the case before the jury, Mr. Duvall, the attorney for the Commissioners, in addressing the jury in the argument of the case, called attention to the terms of the act of Congress under which the proceeding was conducted [with which affiant was already conversant], and told the jury that they ought to assess at least one-half of the total amount of the damages against the property that would be benefited, exclusive of the railroad company; that he considered there was property so benefited, and that he would advise the Commissioners to reject the award unless the verdict resulted in a finding of benefits to that extent.

That one of the counsel present interrupted Mr. Duvall by saying that he [Mr. Duvall] was not a Commissioner of the District of Columbia, and he replied that he was not, but that it was his business to advise the Commissioners, but that they did not always take his advice, but sometimes "turned him down;" that affiant, as a member of said jury, was not influenced by the statement of the attorney for the Commissioners; that this affiant carefully examined the matter of benefits, making several visits to the property, and the said award represents his best knowledge and judgment as to the value of the land condemned and as to the property benefited and the extent of such benefits—that is to say, in reference to said benefits, the

28 amounts assessed in said verdict represents the actual benefit to each parcel of land mentioned therein. Affiant says tha in the course of the conference of the said jury before the final figures were agreed upon by them they made some changes, in some cases reducing the amounts to be assessed and in other cases increasing the sum, at times the aggregate of the assessment being more than 50% than the damages and in other instances less, but that the final judgment of the extent of benefits and the property benefited was and is represented in the award and verdict signed by him and his co-jurors filed in this cause; that affiant, as well as the other jurors, kept memoranda of the values, etc., as testified to by the witnesses produced before the jury, and that Mr. James F. Oyster, who was the secretary of the jury, kept the minutes of the jury and likewise kept memoranda. Affiant destroyed his memoranda before inquiry therefor was made by any person in interest.

Further affiant saith not.

HENRY O. TOWLES.

Subscribed and sworn to before me this 22nd day of November, A. D. 1900.

A. LEFTWICH SINCLAIR,
Notary Public, D. C.

[SEAL.]

29 In the Supreme Court of the District of Columbia, Holding a Special Term as a District Court.

Filed Nov. 23rd, 1900. J. R. Young, Clerk.

In re WIDENING OF COLUMBIA ROAD AND OLD SIXTEENTH STREET.

Personally appeared before me, the undersigned, Robert I. Fleming, John A. Hamilton, Thomas W. Smith, Edward Graves, William A. H. Church, and James F. Oyster, who, being duly sworn, depose and say:

That they and Henry O. Towles, whose affidavit is filed herewith, were the jury of condemnation in the above-entitled cause; that they have heard read the several exceptions in said cause, and particularly the exception of John M. Clapp and the affidavits filed in support thereof; that all of the testimony produced before affiants in reference to the value of the lands to be condemned and the benefits to be assessed is not set out in the said affidavits or any of them; that they carefully heard and considered all of the testimony produced before them at their several sessions, and that they carefully viewed the land to be condemned and the land adjacent thereto, and that the verdict and award signed by them and filed in said cause represents their best judgment, after mature consideration based upon the testimony produced before them, and their view aforesaid, of the value of the lands condemned in this cause and of the property benefited by said extension and the extent of such benefit; that they did not, in any case, assess an arbitrary sum or percentage of the damages as and for benefits irrespective of benefits, but that in each case they assessed against the specific property the amounts of actual benefits, according to the best of their judgment, knowledge, and belief, as the same is set forth in Schedule 2″, filed with their verdict. Affiants further say that when the testimony was completed, and the court had instructed the jury,

30 in the argument of the cause before the jury, Mr. Duvall, the attorney for the Commissioners, in addressing the jury in the argument of the case, called attention to the terms of the act of Congress under which the proceeding was conducted [with which affiants were already conversant], and told the jury that they ought to assess at least one-half of the total amount of the damages against the property that would be benefited, exclusive of the railroad company; that he considered there was property so benefited and that he would advise the Commissioners to reject the award unless the verdict resulted in a finding of benefits to that extent; that one of the counsel present interrupted Mr. Duvall by saying that he [Mr. Duvall] was not a Commissioner of the District of Columbia, and he replied that he was not, but that it was his business to advise the

Commissioners, but that they did not always take his advice and sometimes "turned him down."

That affiants did not consider they were bound by said statements of the said attorney, and that in fact they were not controlled or influenced thereby in making up their award.

They further say that they gave diligent and careful attention to the discharge of their duties in the premises and in all respects followed the instructions and directions given by the court for their guidance.

That affiant James F. Oyster, speaking on his own account, says he acted as secretary of said commission and kept minutes of the testimony adduced before them, but, not deeming the same as of further value, destroyed the same after the filing of the award.

ROBERT I. FLEMING.
JOHN A. HAMILTON.
THOMAS W. SMITH.
EDWARD GRAVES.
WILLIAM A. H. CHURCH.
JAS. F. OYSTER.

Subscribed and sworn to before me this 22nd day of November, A. D. 1900.

A. LEFTWICH SINCLAIR,
Notary Public, D. C.

31 In the Supreme Court of the District of Columbia.

Filed July 9th, 1901. J. R. Young, Clerk.

In re WIDENING OF COLUMBIA ROAD AND OLD SIXTEENTH STREET.
No. 577. District Court.

Decree of Final Confirmation of Verdict, Award, and Assessment.

It appearing to the court that the order *nisi* confirming the verdict, award, and assessment of the jury filed herein, has been duly published as therein provided, and that the Metropolitan Railroad Company and the owners of land condemned and the owners of land assessed in said verdict have been duly notified of the pendency of these proceedings as provided in said order, and it appearing to the court that by a clerical error in said verdict an assessment appears to have been made against lot eighteen [18], in block fourteen [14], of Meridian Hill subdivision, owned by George T. Dearing, in the sum of one hundred and fifty dollars [$150.00], whereas said assessment was in fact one hundred dollars [$100.00] and should have so appeared, it is, this 9th day of July, 1901, by the court adjudged, ordered, and decreed that the said verdict, award, and assessment be, and the same hereby is, amended accordingly, so as to show an assessment against said land in the sum of one hundred dollars [$100.00]; and argument of counsel upon the exceptions to said verdict filed herein having been heard and considered, it is, by

this court, this 9th day of July, 1901, further adjudged, or-
32 dered, and decreed, upon the motion of the Commissioners of the District of Columbia, that the said exceptions and each of them be, and they are hereby, overruled, and the aforesaid verdict, award, and assessment, as amended as aforesaid, be, and the same hereby is, in all respects finally confirmed.

A. B. HAGNER, *Justice.*

33 In the Supreme Court of the District of Columbia.

Filed July 22nd, 1901. J. R. Young, Clerk.

In re WIDENING OF COLUMBIA ROAD AND PRESENT SIXTEENTH STREET. District Court. No. 577.

Appeal of — to the Court of Appeal- and Order of Citation to Issue.

The clerk of said court will please note the appeal of John M. Clapp to the Court of Appeals from so much of the decree in this cause passed July 9th, 1901, which overrules the exceptions of said Clapp and confirms the verdict and award of the jury as to him and his land, and the clerk will please issue citation to the Commissioners of the District of Columbia accordingly.

E. H. THOMAS,
Attorney for John M. Clapp.

34 In the Supreme Court of the District of Columbia.

In re WIDENING OF COLUMBIA ROAD AND SIXTEENTH STREET. No. 577. Dist. Court.

The President of the United States to Henry B. F. Macfarland, John W. Ross, and Lansing H. Beach, Commissioners of the District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the supreme court of the District of Columbia on the 22d day of July, 1901, wherein John M. Clapp is appellant and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 22d day of July, in the year of our Lord one thousand nine hundred and one.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 22 day of July, 1901.

ARTHUR H. O'CONNOR,
Attorney for Appellee-.

35 *Memorandum.*

July 22, 1901.—Appeal bond of John M. Clapp filed.

Order Allowing John M. Clapp Severance, &c.

Filed August 12, 1901.

In the Supreme Court of the District of Columbia.

In the Matter of WIDENING OF COLUMBIA ROAD AND PRESENT SIXTEENTH STREET. No. 577.

On motion of John M. Clapp, by his attorney, E. H. Thomas, it is, this 12th day of August, 1901, ordered that a severance be granted him and he be granted the privilege of prosecuting his appeal separately from the other exceptants in said cause.

HENRY M. CLABAUGH, *Justice.*

36 *Order Extending Time, &c.*

Filed August 30, 1901.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re WIDENING OF COLUMBIA ROAD AND SIXTEENTH STREET. No. 577. District —.

It is hereby ordered this 30th day of August, 1901, that the time for filing transcript of record upon the appeals of John M. Clapp, Anna M. Heinz, Harriet L. Vining, and Donald McPherson in the above-entitled cause be, and it is hereby, extended until the 1st day of October, 1901.

By the court:

JOB BARNARD, *Justice.*

37 *Order Further Extending Time to File Transcript.*

Filed September 28, 1901.

In the Supreme Court of the District of Columbia, Holding a United States District Court.

In re WIDENING OF COLUMBIA ROAD AND PRESENT 16TH ST. No. 577.

On motion of E. H. Thomas for John M. Clapp, Harriet L. Vining, Donald McPherson, and Anna M. Heinz, it is by the court, this 28th day of September, 1901, ordered that the time for perfecting the record of said John M. Clapp, Harriet L. Vining, and Donald McPherson and Anna M. Heinz on their respective appeals in this

cause be, and the same is, extended hereby to and including the first day of November, 1901.

T. H. ANDERSON, *Justice.*

38 *Stipulation of Counsel.*

Filed October 12, 1901.

In the Supreme Court of the District of Columbia, Holding a United States District Court.

In re WIDENING OF COLUMBIA ROAD AND THE PRESENT SIXTEENTH STREET. No. 577.

It is hereby stipulated by and between counsel for the appellant, John M. Clapp, and the appellee, The District of Columbia, that the blue-print copy of the finding and award of the jury of condemnation, both of damages and of benefits, now filed with the clerk, may be considered and made a part of the record of appeal, and that the said copy of said finding and award of said jury need not be printed, but may be referred to by either side in the argument of the case in the Court of Appeals, and be considered a part of the record therein.

It is further stipulated that the following list of papers, together with said blue-print copy, shall constitute the record on this said appeal:

1900, July 12. Petition of Commissioners of the District of Columbia.
(Omitting prayers Nos. 1, 2, and 5.)
Aug. 1. Order appointing jury of 7 to assess damages, etc.
Nov. 7. Instruction No. 4 submitted by E. H. Thomas and granted by the court.
Sept. 27. Verdict and award of jury, omitting Schedules 1 and 2, except following, which insert, viz:

39 SCHEDULE No. 1.

Block.	Lot.	Square feet of area.	Awards.	Owners.
(Unsubdivided tract bounded by Lanier Heights, Walbridges, Ingleside, Columbia road, Denison and Leighton's subdivision, and lands of Mary Swaim Thompson)	.....	9,260.4	$5,556.00	John M. Clapp.

SCHEDULE No. 2.

Block.	Lot.	Square feet of area.	Assessments.	Owners.
Unsubdivided tract described as follows: Beginning at the southwest corner of lot 81 of Denison & Leighton's subdivision, thence 86° 50′ E. 330 feet, thence S. 14° 29′ E. 818 feet, thence S. 53° 15′ W. 280.73 feet, thence N. 41° 23′ W. 739 feet, thence N. 14° 29′ E. 445 feet, thence direct to the beginning.	.....	.....	2,032.00 $5,339.00	John M. Clapp.

1900.
Oct. 27. Exceptions of John M. Clapp, omitting affidavit of E. H. Thomas, excepting last page of said affidavit, which insert.
Nov. 23. Affidavit of Henry O. Towles.
Nov. 23. " " 6 members of jury.
1901.
July 9. Decree of final confirmation (1st page).
July 22. Appeal of John M. Clapp.
July 22. Citation and filing of bond.
Extension of time for appeal to October 1, 1901.
Sept. 28. Order extending time for filing transcript on appeal to Nov. 1, 1901.
Order allowing severance to John M. Clapp.

40–55 It is further stipulated that counsel for either party, appeallant or appellee, may, upon the hearing of this cause upon appeal, produce and read from any other part of the record of the supreme court of the District of Columbia in said cause, and may, if necessary, make the same a part of the record on appeal, although the same be not included in the printed record.

A. B. DUVALL,
By ARTHUR H. O'CONNOR,
For Appellee.
E. H. THOMAS, *For Appellant.*

56 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 55, inclusive, to be a true and correct transcript of the record, as per stipulation of counsel herein filed, copy of which is made part

of this record, in cause No. 577, district court, *In re* Widening of Columbia Road and Sixteenth Street, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, this 17 day of October, A. D. 1901.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1134. John M. Clapp, appellant, *vs.* Henry B. F. Macfarland *et al.* Court of Appeals, District of Columbia. Filed Oct. 21, 1901. Robert Willett, clerk.

IN THE

Court of Appeals of the District of Columbia.

APRIL TERM, 1902.

No. 1134.

JOHN M. CLAPP, APPELLANT,

vs.

HENRY B. F. MACFARLAND, JOHN W. ROSS, AND JOHN BIDDLE, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, APPELLEES.

BRIEF AND ARGUMENT ON BEHALF OF APPELLEES.

ANDREW B. DUVALL,
[redacted],
ARTHUR H. O'CONNOR,
Attorneys for Appellees.

GLOBE PRINTING CO., WASHINGTON, D. C.

IN THE

Court of Appeals, District of Columbia

APRIL TERM, 1902.

No. 1134.

JOHN M. CLAPP, APPELLANT,

vs.

HENRY B. F. MACFARLAND, JOHN W. ROSS, AND JOHN BIDDLE, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, APPELLEES.

BRIEF AND ARGUMENT ON BEHALF OF APPELLEES.

STATEMENT OF FACTS.

The proceedings in this case were instituted under the authority of the Act of Congress entitled "An Act authorizing and requiring the Metropolitan Railroad Company to extend its lines on old Sixteenth street," approved June 6, 1900 (31 Stat.) The first section of the Act authorized and required said railroad company "to extend by double tracks the lines of its underground electric railroad from its present terminus at the intersection of Eighteenth street and Columbia

road easterly along Columbia road to the present Sixteenth street northwest, thence north along Sixteenth street to Park street." It was provided in Section 2 "That before such extension shall be constructed Columbia road shall be widened to a width of one hundred feet, the present Sixteenth street shall be widened to a width of eighty-five feet from Columbia road to Park street." The same section provides that the Commissioners of the District of Columbia shall institute in the Supreme Court of the District of Columbia, sitting as a District Court, a proceeding *in rem* to condemn the land necessary for the extension of Columbia road, etc. The Act provided for a jury of "seven judicious, disinterested men, not related to any person interested in the proceedings, and not in the service or employment of the District of Columbia or of the United States." The jury were required to find the amount of damages for each piece or parcel of land condemned, and to assess for benefits any or all pieces or parcels of land which they may have found to be benefited by the widening of the streets to the extent of the benefits as they may have found them to exist. "And in determining the amount to be assessed against said pieces or parcels of land. the jury shall take into consideration the respective situations of said pieces or parcels of land and the benefits they may severally receive from the extension," etc. The verdict of the jury was filed September 27, 1900. On October 27, 1900, the appellant filed exceptions to the award of damages for land taken and assessment of benefits against his tract of unsubdivided land contiguous to the Columbia road, bounding it on the north side near the corner of old Sixteenth street.

The objections are numerous. After the general ob-

jection that the award of damages is grossly inadequate, and the finding of benefits is grossly excessive, the objections filed attempt to point out wherein the verdict is unjust and unreasonable in nine separate paragraphs. (Rec. pages 6, 7, and 8.)

With three exceptions, the pieces or parcels of ground, part of which has been condemned in these proceedings, are lots in various subdivisions. The exceptions are the tracts of land owned respectively by George P. Van Wyk, Jr., Mrs. Mary Swain Thompson, and the appellant, John M. Clapp. The three tracts of land occupy the entire frontage on Columbia road between Quarry road and old Sixteenth street. Of these tracts that of appellant's is much the largest, and extends north to within one hundred and seventy feet of Kenesaw avenue. The land on the opposite (south) side of Columbia road had been subdivided before these proceedings were commenced, and the land necessary for streets in the subdivision donated. Various other owners of land taken, as well as owners of land assessed, excepted to said verdict. All of the objections and exceptions were argued together, and after due consideration by the Court were overruled. A decree of final confirmation of the verdict, award, and assessment was passed on the 9th of July, 1901. From this decree the appellant appealed to this Court on the 22d of July, 1901.

ARGUMENT.

The area of land taken and condemned in this proceeding from the tract of appellant is 9,216.4 feet, and the amount awarded him for the same is $5,556. The area of the entire tract is ten acres. The amount of assessment for benefits against the part not taken is $7,371. The principal effort of the appellant in at-

tempting to maintain his position, that the award for damages is inadequate, is by comparison with the awards to pieces and parcels of land on the opposite side of Columbia road. It is respectfully submitted, however, that no fair comparison can be made between the value of this tract of unsubdivided land and that of the subdivided land on the other side of the street, for on the south side of the street the land is subdivided into lots presently available for building purposes and have a market value which would not pertain to an unsubdivided tract of land. The difference in market value is not merely in the expense of subdividing the tract of appellant's and donating the necessary streets for the purposes of subdivision, but in the difference in the demand in the market for building lots and of a large unsubdivided tract of land. The value of the land taken from the tract of John M. Clapp, the appellant, is its value as a part of that large tract of land, and judged as such there is nothing unreasonable in the difference found by the jury between that land and the land on the opposite side of the street.

A comparison of the assessment against this large tract of land with that against smaller lots in a subdivision is still more untenable. The jury viewed these premises, and, according to the statute, in determining the amount to be assessed against the land, took into consideration the respective situations of the various pieces or parcels of land assessed. And who can say to what extent of area they deem this land not taken to have benefited.

Questions similar to those raised on this appeal have been before the Court so often, and the rules for the guidance of the Appellate Court so distinctly laid down in this jurisdiction, that we do not deem an extensive

argument of this matter necessary and will rest upon the citation of two cases in this jurisdiction, from which we quote. One an appeal by the District of Columbia and the other an appeal by the owner of land assessed, and for further authorities we respectfully refer the Court to the brief on behalf of the Commissioners of the District of Columbia in the case No. 1142 in this Court, January Term, 1902, entitled "Jesse Brown and Rosa Wallach, appellants, against Henry B. F. Macfarland, et al., Commissioners of the District of Columbia." From the case of Shoemaker vs. United States (147 U. S., 304), we quote the following from the opinion of the Supreme Court of the United States:

> "In connection with this part of the subject, we may appropriately consider the objection made to the action of the court below in declining to review and pass upon the evidence that had been produced before the commissioners.
>
> "If, as we have said, the court below was right in refusing to restrict the commissioners to a mere consideration of the evidence adduced, then it would seem to follow that the Court could not be legitimately asked, in the absence of any exceptions based upon charges of fraud, corruption, or plain mistake on the part of the appraisers, to go into a consideration of the evidence. The Court cannot bring into review before it the various sources and grounds of judgment upon which the appraisers have proceeded. The attempt to do so would transfer the function of finding the values of the lands from the appraisers to the Court. Such a course would have presented a much more serious allegation of error than we find in the objection as made.
>
> "The rule on this subject is so well settled that we shall content ourselves with repeating an apt quotation from Mills on Eminent Domain, 246, made in the opinion of the Court below: 'An

> appelate court will not interfere with the report of commissioners to correct the amount of damages except in cases of gross error, showing prejudice or corruption. The commissioners hear the evidence and frequently make their principal evidence out of a view of the premises, and this evidence cannot be carried up so as to correct the report as being against the weight of evidence. Hence, for an error in the judgment of the commissioners in arriving at the amount of damages there can be no correction, especially where the evidence is conflicting. Commissioners are not bound by the opinion of experts or by the apparent weight of evidence, but may give their own conclusions.' "

This Court in the case of District of Columbia vs. Cemetery (5 App., D. C., 513), used the following language:

> "But then, so far as concerns this appeal by the District, we fail to find anything on which to review the decision of the court below. The burden of complaint is that the valuation of the land was excessive. But we have not the means of correcting that, even if we had the authority so to do. There is nothing whatever in the record, except two *ex parte* affidavits, which, of course, we cannot regard, to show excessive valuation, or to show the grounds upon which the valuation was based. We cannot review, much less reverse, upon such a record as this. To the commissioners, and not the court, it must be remembered, the law has committed the matter of the determination of value."

Mr. Justice Hagner, upon determining the exceptions of appellants, as well as other owners filed in the

same case, filed his written opinion, which we append to this brief.

ANDREW B. DUVALL,

[redacted]

ARTHUR H. O'CONNOR,

Attorneys for Appellees.

APPENDIX.

OPINION OF MR. JUSTICE HAGNER.

Nemerous as are the exceptions to the award of the jury, the parties objecting do not constitute one-tenth of the persons interested, which tends to show that the work of the jury upon the whole was performed in a proper manner.

As the exceptions were filed before the decision of the Supreme Court of the United States in the Davidson case, they very generally embody the various objections—"want of notice" and "unconstitutionality"—which were sustained by the Court of Appeals in their decision in that case. It is, of course, unnecessary now to examine this class of objections, since the law has been settled otherwise by the Supreme Court.

The great mass of the remaining exceptions relate to objections based upon the alleged insufficiency of the valuations affixed by the jury to the portion of the property condemned for the widening of Columbia road and of Sixteenth street, and of the alleged exorbitancy of the assessments upon the various properties found by the jury to be benefited by the proposed improvement.

The general rules respecting exceptions for errors on the part of commissioners or juries in the valuation of lands, or in the assessment of benefits against them, have been so repeatedly stated by the Courts that it is hardly necessary to quote from the authorities; but the following may be assumed as settled principles governing the subject.

The report of the commissioners or jury is assumed to be correct, since to them and not the Court the law has confided the function of determinig the values. Where there is no evidence of misconduct on the part of the jury, the Court will not set aside the verdict on the gorund that it is excessive, unless the amount awarded appears to be manifestly wrong, and this, even where the evidence of one of the jurors is filed stating that in his opinion the verdict is too high; or, as elsewhere expressed, when complaint is made of error in the valuation of land taken, the judgment of the commissioners, when lawfully exercised in the absence of strong objections, is conclusive.

> "Where the proceedings are before a Court and the tribunal is appointed by the Court, a report should be made to the Court, although not expressly required by statute, and the Court can accept or reject the report as justice may require. As the Court acts judicially in such matters, it can only act upon them in term time, unless by express provision of the statute. Though the statute provides that the report of commissioners shall be final and conclusive, it may set aside for fraud or misconduct. It means that, upon matters committed to the charge of the commissioners, their judgment shall be conclusive when lawfully exercised. A statute provided that the Court should not set aside the report of surveyors for illegality or irregularity. It was held to refer to *matters of form* merely, and not to matters of *substance*.
>
> "Sometimes statutes provide that the Court may set aside reports for good cause shown, or for sufficient cause. Under such statutes the practice would be the same as in any case where the Court had power to act in the matter of accepting or rejecting the report. And, though the statute authorizes the Court to direct a new

> appraisal before the same or new commissioners, *at its discretion*, it was held that the Court should not interfere unless some substantial error had been committed. In general it may be said that good grounds for setting aside a report are, any defect or insufficiency in the proceedings prior to the appointment of the tribunal, which would have been an adequate reason for refusing the appointment and which have not been waived by the objector, or any mistake, irregularity, or partiality in the proceedings of the tribunal materially affecting the merits of the case."
>
> (Lewis on Eminent Domain, Sec. 520.)

Where it is not really shown that substantial injustice has been done, the proceedings of the jury will be approved, the presumption being that the jury took in acocunt all the facts bearing upon the question of damages, and that there was no bias on their part in the way of a fair verdict. Especially are the courts indisposed to set aside the verdict of a jury in cases where the jury have viewed the premises.

> "The report of the verdict may be set aside on the ground that the damages awarded are too much or too little. In setting aside a report on the question of damages, the Court will be governed by the same principles as obtain in the case of the verdicts of juries in common law suits. Where there is evidence to sustain the verdict and the testimony is conflicting, the Court will not interfere; and especially is this the case where the commissioners or jury have viewed the premises. Where the owner petitions for damages, it is error to allow him more than he claims in his petition. Or a petition to condemn a piece of land large enough for a telegraph pole, adjacent to a railroad over one hun-

dred and fifty feet across defendant's track, there being eleven poles on defendant's land, a verdict for $3,850 was set aside as grossly excessive. A verdict or award which is more than the amount testified to by the witnesses of one party and less than the amount testified to by the witnesses for the other, will not be disturbed on the question of amount alone. Where the award was $50,000, and the petition dismissed the proceedings and commenced anew, and a second award was made of $18,000, the Court, in view of the great discrepancy in the two reports and the conflicting evidence as to value, granted a new trial. Where the first report was set aside because only nominal damages were awarded, and a second report was made also for nominal damages, and no irregularity appeared, the Court refused to set aside."

(Lewis on Eminent Domain, Sec. 524.)

When the jury of condemnation are authorized and required to view the premises, their functions are in the nature of those exercised by assessors rather than those of jurors, as in ordinary cases, since the purpose of the view is to furnish evidence to the jury; and the Court cannot re-examine the merits of the report of the viewers and set it aside for mere inadequacy, although the law under which they are acting authorizes the report to be heard and affirmed or set aside, as may be lawful and right.

(Pa. R. R. Co. vs. The First German Lutheran Congregation of Pittsburg, 83 Pa. State, 447.)

In 84 Mo. 412, City of Kansas vs. R. R., the Court said when the verdict is not so flagrantly unjust as to

justify the conclusion that improper considerations influenced ther verdict, the Court cannot interfere; the view is evidence, and the Court cannot see how far their verdict is rendered on the other evidence, and how far it is attributable to their own observation and judgment.

The amount of compensation is to be determined by the jury from the actual survey of the premises when practicable, from their own knowledge of the valuations, and from the opinions of witnesses famaliar with such matters; but they are not bound by the opinions of the witnesses as to the estimate of value or damages. They are not like juries in ordinary civil and criminal cases, bound by the weight of the evidence, but may be governed actually by the view itself. (9 Gill and Johnson, 479, Tide Water Canal Co. vs. Archer.) Or as was expressed (in 54 N. J. L. Rep., Davis vs. Newark) by the Court in speaking of exceptions to alleged excessive charges for benefits:

> "To justify interference on this ground, evidence that the judgment of the commissioners was erroneous must be cogent. I have not been able to find in the evidence sufficient to satisfy me of any error on the part of the commissioners. There is much difference of opinion, however, based on the same facts; but I see no reason to overthrow the judgment of the commissioners who gave special attention and care to the judgment."

The testimony to invalidate the verdict in a case of this character as to the ascertainment of damages and the assessment of benefits almost always consists of that of the parties to the proceedings testifying for themselves and for others similarly situated, sometimes of the attorneys representing parties holding the

lands in controversy, and at other times representing other lands similarly situated; and there must be very fair witnesses against the awards who do not occupy one or more of these relations to the subject.

Much of this testimony appears to have been based merely upon the observation of the land by the witnesses; and it appears, so far as the Court can find anything in the record bearing on the subject, that such observation was of short duration. On the other hand, the judgment of the jury, by the terms of the Act of Congress, was required to be rendered by seven judicious and disinterested men, not in the service or employment of the District of Columbia or of the United States, to be summoned by the Marshal for the District, men who should make oath that they were not in any manner interested in the land to be condemned or in any way related to the parties interested therein; and in the present case these persons, acting under this oath of office and admitted to be men of high character, were engaged in the examination of every portion of these lands for a much longer time than any of the witnesses who were adduced to impeach the award, and they heard the entire testimony respecting each finding returned by them under their oaths.

These commissioners, with the single exception of the case of Deering, with respect to lot 18 in block 14 where a mistake of $50 is said to have been made, are unanimous in their assertion that their verdict was, as they had sworn it should be, just and fair to all persons interested. The only intimation of anything like misconduct on their part is contained in the account of a conversation with one of the commissioners, Mr. Towles, as to the manner in which the jury arrived at certain of their valuations. That testimony was in-

tended to show that some, at least, of the assessments of benefits were arbitrarily increased for the purpose of aggregating a sum equal to one-half of the gross amount of the damages returned. But, assuming that conversation to have been correctly understood and reported and as truly representing the impressions of Mr. Towles (which is disputed by him in his affidavit and denied by others of the jurors), there is nothing to show that any others of the jurors entertained any such views. Unless this were shown to be the case, the individual opinion attributed to Mr. Towles could not be taken as invalidating the opinions of the other six jurors. In 51 N. Y., Supplemental Reports, p. 406, McKee Land & Improvement Co., of Rochester, vs. Swikehard et al., it was held that, improper remarks by one of the commissioners, in regard to their assessing property for a sewer, not having been shown to have affected the action of any other member of the commission, was not to be considered as prejudicial to the owners of the land. The Court said:

> "Testimony was introduced, and much is claimed for it, to show that one of the commissioners (Luetchford) was governed by improper considerations in his actions upon the commission in the assessment of the McKee tract. His language was approved, and cannot be defended. It did not, however, occur at any time when action was being taken as to the McKee tract. In fact, a preliminary statement of the apportionment had already been prepared before Luetchford's remark, which, when applied to the McKee tract, shows that the McKee assessment had been practically arrived at by informal action of several members of the commission before Luetchford referred to it. The case does not show that the commission, or that the action of

any member was affected by it; in fact, the contrary appears."

And supposing it was true that the estimates of the jurors were changed in some individual instances with a view to arriving at an aggregate equal to one-half of the damages found, yet, there is nothing to show that those changes in the direction of increasing the particular assessments of benefits; and the information is perfectly consistent with the idea that the changes referred to effected a diminution of those particular assessments instead of increasing them.

If the fact that some or all of the jurors empaneled in any ordinary case had varied in opinion during their consultation as to how they should find their verdict, or as to its amount, were to be accepted as invalidating their final deliverance to the Court, very few verdicts would be allowed to stand. That some unexplained cyphering was discovered upon the back of some papers that had been before the jury was something, probably, that quite frequently might appear and in many cases, where the jurors instead of leaping at the result have deliberated of their verdict, as would be their duty. What the jury in this cause swore was that their verdict was rendered, "without favor or partiality, and to the best of their judgment," and their oath was not made as to the meaning of the casual cyphering referred to.

The complaint that the Attorney of the District claimed in his address to the jury that they should return an amount as *benefits* equal, at least, to one-half the sum of the award of damages, as pointed out in the Act, furnishes no just ground for impeaching the verdict. Whether it would have been better had the remarks alluded to been omitted it is not necessary to

decide, as it was admitted by the Attorney at the time in reply to a question by a juror that he was not speaking for the Commissioners of the District, and the jurors were no more bound to abide by his opinion on that point than by the various remarks that must have been made by the numerous attorneys who appeared for the land holders.

Only a few of the exceptions present any new point. The greater majority consist of the usual objections that the allowances of damages for land taken are too low; and that the assessments for benefits are too high. These objections are frequently made, with an apparent inconsistency, by the same land owner. An instance of that is shown in the exceptions of Louis Ballioux, who swears with respect to his land that the assessment for benefits "is grossly exorbitant, and the amount awarded for damages is grossly inadequate, which, if true, would seem to impute to the jury a remarkable amount of ignorance and lack of judgment, or of moral or mental perversity."

One of the forms of exception more out of the usual track appears in the objection filed by Lydia A. Tanner to the assessment of lot 102 for benefits in the present proceeding (No. 577), on the ground that part of the same lot will, in another proceeding (No. 580), be comprehended within the lines of another projected street. But this has been held by the courts to constitue no valid objection to the condemnation for benefits in another case—as has been decided in this Court in this class of proceedings. See also 113 Pa. State, 536, Michaner vs. City of Phila., as follows:

> "The plaintiff alleges, however, that his property is not benefited by the sewer. He may or may not be mistaken in this. We cannot say.

> But this is a species of taxation, and all taxation is presumed to be for the benefit, directly or indirectly, of the taxpayer, or his property. Laid as taxes are, under general laws, there will always be cases of apparent individual hardship. The childless man may claim that the taxes which he is compelled to pay for the education of the children of other persons confer no benefit upon him. The law does not so regard it. Education produces a higher degree of intelligence, the fruits of which are seen in increased good order and diminished crime. When a man comes to pay his general taxes he cannot be permitted to allege that he derives no benefit therefrom. And it would be improbable if in every instance of special taxation the question of benefits could be thrown into the jury box. It would introduce into municipal government a novel and dangerous feature. It would substitute for the responsibility of councils, limited though it be, the wholly irresponsible and uncertain action of jurors. It is better to endure the ills we have than fly to those we know not of."

It would, of course, be impossible for me to discuss *seriatim* each of these exceptions. I have examined them all by the light of whatever appears in the case that can be properly called evidence. Whether it would have been wiser to have required a record to be presented of the evidence adduced before the jury is a matter for the legislature to decide. Such a record, to be of any value, should, of course, omit nothing; for something important testified to with respect to one of the undisputed awards might necessarily be applicable by the jury to every other case, and no part of it could be justly omitted if the appellate court should have a full understanding of what occurred; and it would be a

difficult thing to transfer to paper the precise affect their view of the land had upon the jury, as it would only be formulated in the conversation and discussion by the jurors themselves. Suffice it to say, the statute makes no such requirement; and there was no such record made. And the partial, *ex parte*, affidavit placed in the papers by particular excepting land owners must present to the Court a very meager view of what actually was testified to before the jury, or of what was imbibed by them from their own observation of all the parcels and improvements.

I can only take time to notice with any particularity a few of the exceptions of this class most particularly insisted.

The protests of Mrs. Breckinridge, of the company of Rider, Wolcott, Sanders, W. W. Brown, and some others, are based upon the idea that it is unjust to confine the assessment of benefits to the lots immediately abutting on the Columbia road, but that they should apply to all property from which it adds a convenient access to the city.

On the other hand, Mr. Cousar and Heinz, and others protest against *their* lots being charged with any benefits, because they are so *remote* from Columbia road, and do not abutt upon it.

These objections seem to answer each other.

Westmoreland, Dr. Davis, and others except to the low valuation of their lands, because, they allege, they paid for them at a higher rate when they became the owners. But even if their statements to this effect are correct, they would only be a few of a large number of persons who have made unwise purchases, and neither their error of judgment nor the fall of prices in the particular locality can prevail against the sworn judgment of intelligent and conscientious

jurors swearing to their belief of the present value of the lots.

According to others of the exceptions, the jury erred or acted improperly in almost every possible respect, including the particulars relied upon in the opinion of the Court of Appeals, before referred to. Others base their objections upon the fact that the street and road have not yet been widened and that the property of the lot owners should not be assessed until the benefit has been actually *earned* by the opening of the street.

The argument of counsel for Mr. Clapp and several others of the exceptors presented their grievances in an able and exhaustive manner. But I find myself unable to arrive at the conclusion that the sums reported for values or benefits are manifestly wrong or unjust, and that the complaints of interested parties under the circumstances appearing in the record should be allowed to prevail against the award of the seven intelligent and impartial jurors who carefully examined the lands for themselves besides listening to all the testimony brought before them by all the land holders and the District authorities.

After looking at the papers there is a good deal to be said about that. It seems to me that the better reason for holding to the reported valuation of the land is that nobody could use it for any but one purpose, and that is as building lots. How would you get to them? There must be some way. Of course, the land is laid out into building lots. Ultimately, if the owner should want to have a street cut through there, he would have to give up his land with no compensation. He has no sewerage, no light, no water—has not anything at all. Is it not beneficial to have the road at the side of this land improved? Would not that tend to develop the

value of the land lying remote thereto, which land would not be fit for any use whatever except what I have stated?

I therefore overrule all these exceptions I have been considering, except that of Mr. Deering, which I must regard as an error in recording the valuation agreed upon as $50 instead of $100.